SUN YOK PENG

v.

SUN LEONG PIN

HIGH COURT MALAYA, MELAKA
KN SEGARA J
[CIVIL SUIT NO: 22-199-1998]
30 JUNE 2004

CIVIL PROCEDURE: *Action - Cause of action - Breach of trust - Defendant given mandate by plaintiff to issue cheques for purposes of business - Defendant issued cheque and transferred money to his personal account - Whether defendant acted in breach of trust.*

CIVIL PROCEDURE: *Trial - Witness - Inconsistencies and contradictions in testimony of witness - Whether witness reliable - Whether credibility of witness reliable*

CIVIL PROCEDURE: *Counterclaim - Bare assertion - No credible evidence to sustain counterclaim - Whether counterclaim ought to be dismissed*

The plaintiff and defendant were siblings. The defendant worked for the plaintiff until August 1997. The plaintiff had opened a bank account in the name of his firm for business purposes. He gave the defendant a mandate to issue cheques drawn on the account. The plaintiff alleged that the defendant, without his authorisation or consent had issued a cheque and withdrawn the sum of RM70,000 for his own personal use. The plaintiff's cause of action against the defendant was thus based upon a breach of trust. However, the defendant contended that the said sum of RM70,000 was withdrawn from the plaintiff's firm's account for repayment of capital supposedly advanced by their parents when the plaintiff first started business. The defendant contended that the RM70,000 had been handed over to the parents, who were deceased at the time of trial. The defendant further counterclaimed against the plaintiff for a sum of RM4,000, allegedly taken by the plaintiff when he entered the defendant's premises.

Held (allowing the plaintiff's claim and dismissing the defendant's counterclaim):

[1] On the evidence, the court was unable to conclude that the parents had advanced a sum of RM70,000 or any other sum to the plaintiff as capital for his business in the firm, as alleged by the defendant. On a balance of probabilities, the court would accept the evidence of the plaintiff that he started the business with a capital of RM8,000 from his own savings. (p 650 c-d)

[2] The court could not consider the defendant a truthful witness. His credibility was wholly unreliable in the light of the various contradictions and inconsistencies in his testimony, upon a scrutiny of all the evidence adduced, both documentary and oral. (p 652 a-b)

[3] The cheque in question, tendered in evidence as exhibit P9, clearly showed that the cheque was written in favour of the defendant for a sum of RM70,000 and was signed personally by the defendant. His testimony that he was forced to sign the cheque and that the moneys were given to his parents was unsupported by any credible evidence. The defendant has acted in breach of the trust when he signed the cheque as an agent of the plaintiff's firm and had the moneys transferred to his personal account. (p 653 e-f)

[4] Even if there was a business debt of RM70,000 outstanding from the plaintiff to his parents, the defendant had no business to arrogate to himself the right to set it off from the firm's account. The defendant had clearly committed a breach of trust. He should be ordered to account for the said sum of RM70,000 by returning the same with interests to the plaintiff. (p 653 g-h)

[5] On the defendant's counterclaim for RM4,000, there was no evidence that the defendant had in possession such an amount in cash, other than for his bare assertion that it was his earnings from his own business. There was also no evidence that the plaintiff had taken the same. (p 654 a-b)

For the plaintiff - Avatar Singh; M/s Mohd Latip & Assocs
For the defendant - CH Lee; M/s Lee & Yong

Reported by Andrew Christopher Simon

JUDGMENT

KN Segara J:

The plaintiff is the sole-proprietor of a firm carrying on business known as Peng Motor Repair Engine and Auto Electrical Service (hereinafter referred to as the "said firm"). The business was registered on 21 February 1987 and the said firm carried out its business at No. 11 Jalan Suria 4, Taman Malim Jaya, Melaka. The defendant is the younger brother of the plaintiff, and worked with the plaintiff until August 1997, when he started his own business known as Syarikat Pin Auto Engine Repair & Electrical Services, at the same premises the plaintiff had carried on his business, upon plaintiff terminating his tenancy of the said premises.

Counsel for plaintiff and the defendant have agreed that there are only two issues to be determined by the court, namely:

1. Whether the plaintiff is entitled to the RM70,000, which was withdrawn by the defendant from the said firm's account No. 504067-0059-5, at Malayan Banking Berhad, Taman Malim Jaya, on 24 July 1997;

2. In the counterclaim, whether the plaintiff is liable to the defendant for the sum of RM4,000, allegedly taken by the plaintiff from the defendant's workshop.

The plaintiff had opened a current account No. 504067-0059-5, at Malayan Banking Berhad, Taman Malim Jaya branch, in the name of the said firm, for his business purposes. The defendant was given a mandate by the plaintiff to issue cheques on behalf of the said firm (see exh. P8). Exhibit P8 appears to be a bank document - it is an authority to the bank, given by the plaintiff, to honour all cheques drawn on the said account by the authorized person named therein, that is, the defendant. The said mandate was given in 1996 and has not been revoked. The plaintiff testified, *inter alia*:

> Untuk menguruskan perniagaan Peng Motor saya ada membuka satu akaun semasa di MBB Taman Malim Jaya. Nombor akaun 504067-0059-5. Saya ada memberi satu mandat bank kepada defendan untuk menguruskan akaun tersebut tujuan perniagaan saya.
>
> Defendan bersama-sama saya ke bank untuk menandatangan bersama-sama saya. Saya menandatangan mandat ini pada tahun 1996.
>
> Saya ada memberitahu defendan pada 1996 semasa saya menandatangan mandat tersebut bahawa beliau hanya boleh mengeluarkan wang setakat RM10,000 sahaja iaitu had sekeping cek setakat RM10,000.

Saya memilih defendan untuk memberi mandat ini oleh kerna beliau adalah adik saya. Saya percaya kepada beliau.

Tujuan saya memberi mandat ialah saya ingin perniagaan saya berjalan dengan lancar semasa saya pergi outstation. Saya telah membuka akaun ini lebih awal - iaitu pada tahun 1993 atau 1994 - apabila cawangan bank Malayan Banking Berhad memulakan perniagaan di sana.

Sebelum 24.7.1997 defendan tidak pernah menandatangani apa-apa cek melebihi RM10,000.

Pada bulan 8 tahun 1997 saya dapat tahu bahawa defendan telah mengeluarkan cek melebihi RM10,000 apabila saya terima statement bagi bulan Julai 1997. Dia telah mengeluarkan satu cek sebanyak RM70,000 pada 24.7.1997 atas nama sendiri.

Nombor cek ialah 081135 bertarikh 24.7.1997 dari akaun Peng Motor Repair Engine & Electrical Sevice.

Saya tidak berhutang kepada defendan.

Saya tidak berhutang kepada bapa atau ibu saya.

Saya tidak berhutang kepada sesiapa pun jumlah sebanyak RM70,000 itu.

Saya rasa marah dan hilang kepercayaan pada adik saya iaitu defendan. Saya terus bincang dengan defendan dan minta beliau pulangkan wang RM70,000 balik kepada akaun perniagaan saya. Dia minta saya pergi bincang dengan ibubapa saya.

Saya ada pergi berjumpa ibubapa saya. Saya tidak dapat menyelesaikan ... .

Semasa saya bincang dengan ibubapa saya seperti diarahkan oleh defendan ibubapa saya tidak memberitahu saya bahawa saya berhutang kepada mereka (iaitu ibubapa).

The plaintiff's cause of action against the defendant for the sum of RM70,000 is based on a breach of trust. The plaintiff pleaded, *inter alia*, as follows:

3(a) Di atas dasar kepercayaan, maka Plaintiff telah memberi kebenaran kepada Defendan untuk menandatangani segala cek-cek untuk Syarikat Peng Motor Repair Engine & Auto Electrical Service yang mana cek-cek tersebut harus dan hanya digunakan untuk tujuan perniagaan Plaintiff sahaja secara spesifik.

(b) Plaintif memberi kebenaran sedemikian kepada Defendan (iaitu adik beliau), kerana plaintif harus berada di kawasan luar daripada Negeri Melaka untuk perniagaan untuk beberapa hari dari masa ke masa dan sekaligus Plaintif tidak mahu urusan perniagaan beliau terbantut.

(c) Pada tanggal 24hb. Julai, 1997, Defendan tanpa kebenaran resmi/persetujuan Plaintiff telah mengeluarkan wang tunai sebanyak RM70,000.00 sahaja daripada akaun Syarikat Plaintif tersebut untuk tujuan kegunaan persendirian beliau. Butir-butir cek tersebut ialah Cek MBB No. 081135, yang bertarikh 24hb. Julai, 1997 (kemudian daripada ini disebut sebaai "Cek Tersebut").

(d) Perbuatan Defendan sedemikian telah melanggar dasar kepercayaan Plaintif terhadap Defendan dan sekaligus ia merupakan suatu perbuatan yang tidak bertanggungjawab langsung, memecah amanah serta menyalahi di sisi lunas undang-undang.

Butir-butir Pecah Amanah

(a) Tanpa kebenaran dan/atau persetujuan Plaintif mengeluarkan wang Plaintif untuk kegunaan persendirian.

(b) Menyalahgunakan kuasa yang diberi oleh Plaintif kepada Defendan.

With reference to the cheque and RM70,000 the defendant pleaded in his statement of defence, *inter alia*, as follows:

3 (a) ...

(b) Plaintif memberi Defendan sekeping cek pada bulan Julai 1997 untuk jumlah RM70,000.00 tetapi oleh kerana akaun semasa di Malayan Banking Berhad, Malim Jaya tidak mempunyai wang yang cukup, Plaintif mengeluarkan cek yang baru dan memberitahu Defendan untuk menandatangani sendiri kerana tandatangan seorang adalah sah seperti yang dinyatakan dalam mandat tersebut.

(c) Jumlah sebanyak RM70,000.00 telah dikeluarkan daripada bank tersebut dan diberikan kepada ibubapa Plaintif dan Defendan. Jumlah RM70,000.00 tersebut dianggap bayaran balik modal oleh kerana ibubapa mereka telah membayar untuk perniagaan atas nama Peng Motor Repair Engine & Auto Electrical Service.

(d) ...

(e) ...

(f) ...

4. ...

(a) ...

(b) Jumlah RM70,000.00 tersebut dianggap sebagai bayaran balik kepada ibubapa Plaintif dan Defendan pada 24hb Julai 1997 oleh kerana Plaintif telah dapat pertolongan secara kewangan pada permulaan perniagaan Plaintif yang termasuk Peng Motor Engine Repair & Electrical Services. Selepas penamatan perniagaan Plaintif dalam Peng Motor Engine Repair & Electrical Service dipremis No. 11, Jalan Suria 4, Malim Jaya, 75250 Melaka (selepas ini dipanggil premis tersebut) pada 1hb Julai 1997.

In short, the defendant contends that the sum of RM70,000 was withdrawn from the said firm's bank account for repayment of capital allegedly advanced by the parents to the plaintiff when he started his business. The defendant further contends that the said sum was handed over to the parents.

On the evidence adduced before me, I am unable to make a finding that the parents had advanced a sum of RM70,000 or, any other sum, to the plaintiff, as capital for his business in the said firm, as alleged by the defendant. Unfortunately, the parents are not alive to testify either on behalf of the plaintiff or the defendant. On the balance of probabilities, I accept the evidence of the plaintiff that he started the business with a capital of RM8,000, from his own savings.

Apart from the bare assertion of the defendant (DW1) and, his brother (DW4), there is no evidence of the alleged loan by the parents to the plaintiff. There is even uncertainty as to the amount of the alleged loan and when it was disbursed to the plaintiff by the parents. In para. 3(c) of the statement of defence the defendant had pleaded the loan was RM70,000 but, the defendant testified in court, the loan was RM60,000 and, paid in three instalments by the parents, when the plaintiff started his business in 1987, whereas DW4 testified the loan was disbursed in 1978. The defendant further testified that the loan had been paid back to the parents on 24 July 1997, by a cheque for RM70,000, issued by Sun Man Pin to their parents. He also testified that they paid an excess of RM10,000, on the sum of RM60,000 borrowed, by agreement amongst the brothers. Sun Man Pin was neither called as a witness to testify that he had issued a cheque for RM70,000, on 24 July 1997, to the parents nor was any evidence adduced of the agreement by all the brothers to pay the extra RM10,000 for the alleged RM60,000 loan. DW1 testified in examination-in-chief, *inter alia*, as follows:

> Wang sebanyak RM70,000 telah dikembalikan kepada ibubapa kami pada 24.7.1997 melalui cek.
>
> Kami bayar RM10,000 lebih daripada modal yang dipinjam (RM60,000) atas persetujuan di antara adik beradik kami.

Sun Man Pin mengeluarkan satu keping cek untuk RM70,000 kepada ibubapa kami.

Under cross-examination, the defendant testified, *inter alia*:

I am aware that bank account No. 504067-0059-5 in the name of Peng Motor Repair Engine and Auto Electrical Services was to be operated only for the purpose of the business. This account was opened by the plaintiff and I was given a mandate (P8) to sign cheques on behalf of the business.

I did say in my evidence-in-chief that the plaintiff owed my father RM60,000 and as a gesture of goodwill the plaintiff gave an extra RM10,000 when returning the money owed.

I was instructed by the plaintiff to issue a cheque under the name of Peng Motor and the cheque was put into my personal account and he had instructed me to issue my personal cheque to my father and mother. With the cheque given by me my father and mother went to Southern Bank to open a new account under the name of my father and mother. They opened one account in their joint names.

The plaintiff wrote the cheque in my name for RM70,000.

Initially the plaintiff issued one cheque in my name for RM70,000 from a different account and both of us signed the cheque. However, this cheque was not cleared as there was insufficient funds in that account. That was also Peng Motor's account. Subsequently the plaintiff issued another cheque in my name from account 504067-00059-5 and forced me to sign. I asked why he didn't sign, he said my signature alone is good enough.

The cheque in issue is exh. P9 (Bundle B p. 9). The defendant testified, in cross-examination, with reference to this cheque, as follows:

I do not know who wrote the date 24.7.1997 on this cheque.

I signed this cheque and I was forced to sign this cheque.

I do not know who wrote "Mr Sun Leong Pin I/C A0809990" on the cheque.

I do not know who wrote the words "Seventy Thousand Only".

I do not know who wrote the figure "70,000" in the said cheque.

When I was forced to sign the cheque was already filled up but I do not know who filled up the cheque.

I agree that the sum RM70,000 I withdrew was deposited into my account as per exhibit D5.

> I agree as per exhibit D5 I withdrew the RM70,000 by two cheques one for RM25.000 and another for RM45,000 on 30.7.1997.

I do not consider the defendant to be a truthful witness and, his credibility on material particulars, is wholly unreliable, in the light of the various contradictions and inconsistency in his testimony, upon a scrutiny of all the evidence adduced in this case, both documentary and oral.

Initially, the defendant claimed that the plaintiff had issued one cheque in his name for RM70,000 (alluding to exh. D4 - Bundle C1 p. 4) which was signed by both the defendant and the plaintiff but from a different account. The defendant claimed the cheque was not cleared because there was insufficient funds. Yet, there was no evidence the cheque was not cleared because there was insufficient funds. There was no evidence that the defendant had been given a mandate to sign this cheque from the said account, like the mandate exhibit P8, for the account from which cheque exh. P9 was issued. Had the defendant realized this on 24 July 1997 and, thereupon substituted exh. D4 with exhibit P9?

It is hard to believe that the plaintiff issued another cheque for RM70,000 from account 504067-0059-5 in substitution for D4 and the defendant forced to sign same. Such conduct by the plaintiff defies imagination and is against all probabilities.

The cheque book from which D4 was issued was produced by plaintiff and marked as P1. The book was for cheques No. 014651 to No. 014700.

The plaintiff testified about this cheque book (P1) and cheque (D4) in examination-in-chief, as follows:

> P1 selalu disimpan dalam laci saya di pejabat. Selain daripada saya adik saya Sun Leong Pin (defendan) juga mempunyai kunci laci tersebut.
>
> Sun Leong Pin tidak ada kuasa untuk tandatangan cek-cek dalam P1.
>
> Cek ini adalah dari buku cek P1. Saya yang tulis nama pembayar iaitu "Mr Sun Leong Pin I.C. A0809990".
>
> Saya telah isi nama "Mr Sun Leong Pin IC A080990" oleh kerana buka satu akaun di Malayan Bank atas nama persendirian dia. Saya tidak isi jumlah dan tarikh kerana tiada masa untuk pergi bank untuk buka akaun.
>
> Saya tidak boleh ingat tarikh saya telah tulis nama "Mr Sun Leong Pin" atas cek 014656 - mungkin antara tarikh 30.4.96 dan 6.5.96.
>
> ...

> Saya hanya sedar bahawa cek 014656 tidak ada dalam buku cek P1 pada 17.12.98. Cek tersebut telah dikemukakan sebagai eksibit oleh Sun Leong Pin di dalam affidavit beliau bertarikh 17.12.98 dalam kes ini di dalam Saman Dalam Kamar bertarikh 20.11.98 (kandungan 6).

Under cross-examination the plaintiff testified, *inter alia*, about the cheque D4:

> Cek ini untuk tahun 1996. Tulisan nama penerimaan dan tandatangan saya dibuat dalam tahun 1996. Tarikh dan amaunnya bukan tulisan saya. Lagipun tarikh cek ini ialah dalam tahun 1997.

On a balance of probabilities, on the evidence, I find that exh. D4 was never issued by the plaintiff on 24 July 1997. His evidence, that he had signed the undated cheque leaf No. 014656 without the amount filled sometime between 30 April 1996 and 6 May 1996, is consistent with the truth, upon examining carefully the cheque book P1. Obviously, the said cheque leaf had gone missing and surfaced again on 24 July 1997 when the defendant added his signature as a co-signatory and, filled up the blanks with respect to the amount and the date. The irresistible inference is that upon realizing the cheque was invalid, because he was not authorised to sign cheques from this account, he immediately caused to issue cheque P9 and, signed same on the strength of the mandate P8.

The cheque P9 clearly shows that the cheque was written in favour of the defendant for a sum of RM70,000 and signed personally by him. His testimony that he was forced to sign and, that the monies were given to his parents, is unsupported by any credible evidence. The defendant has acted in breach of trust when he signed P9, as agent of the plaintiff's firm and, had the monies transferred to his personal account. As the trusted employee and brother of the plaintiff, the plaintiff gave the defendant the mandate to sign cheques on behalf of the said firm for its business purposes only, from account No. 5000595. The defendant has acted against all good conscience and dishonestly. He has breached his obligations as a fiduciary in issuing a cheque in his own name for the sum of RM70,000 for purposes unrelated to the said firm's business and, for an amount in excess of the orally authorized limit (RM10,000) given by the plaintiff. Even if there was a debt of RM70,000 outstanding from the plaintiff to his parents, the defendant has no business to arrogate to himself the right to set it off from the said firm's account. The defendant has clearly committed a breach of trust. Therefore, the defendant shall be ordered to account for the sum of RM70,000 to the plaintiff, by returning same to the plaintiff together with interest at the rate of 4% per annum from 24 July 1997 till date of judgment and, at 8% per annum thereafter, until payment. The plaintiff shall also be entitled to the costs herein.

On the counterclaim for the sum of RM4,000, belonging to the defendant, allegedly taken by the plaintiff when he entered the premises to remove his belongings, after he had ceased his business towards the end of July 1997, there is no evidence that the defendant had in fact possession of such an amount in cash, other than for his bare assertion that it was his earnings from his business. Even if the defendant had such a large sum of money in cash belonging to him kept in the said premises, there is no evidence that the plaintiff had taken the same. In the circumstances, the plaintiff is not liable to the defendant for the said sum of RM4,000.

There shall be judgment for the plaintiff in the sum of RM70,000 together with interest and costs. The defendant's counterclaim is dismissed with costs.